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Public Prosecutor v William Josep ak Ah Kiang

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HIGH COURT (KUCHING) — CRIMINAL CASE NO KCH-45B-1/9 OF 2016
STEPHEN CHUNG J
29 SEPTEMBER 2017

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Criminal Law — Offences — Murder — Whether accused intoxicated — Whether accused could rely on self-induced intoxication as defence — Whether stab wound sufficient in ordinary course of nature to cause death to deceased — Whether failure to cross-examine witness on crucial part of case amounted to acceptance of witness's testimony — Whether accused failed to raise reasonable doubt — Penal Code s 302

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On 2 July 2016, at about 8.30pm, a police officer ('PW1') from IPD Kota Samarahan, received information from the Unit Gerakan Sarawak about a fighting case at Kampung Kuap, Jalan Kimura and that one man was injured. PW1 conveyed this information to another police officer ('PW12') who was in a police mobile patrol vehicle (MPV), with other police personnel, to go to the address. On arrival, at about 9.05pm, they saw a crowd in front of one house. Then they saw a dead body covered with a white cloth in front of the house. The deceased was identified as Jeffery ak Ah Kiang ('the deceased') by his father ('PW4') at the scene. A member of the public handed one male suspect to PW12 who arrested the suspect. The suspect, who was the accused in the present case, was identified as William Josep ak Ah Kiang by PW4 also at the scene. The accused was the younger brother of the deceased. His father also identified the accused in court. PW1 lodged a police report on the information received and PW12 lodged a police report on the arrest. The accused was charged for murder under s 302 of the Penal Code ('the Code') for causing murder of the deceased.

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Held, convicting the accused:

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(1) The accused had and maintained his mental faculty. Although he had consumed alcohol during the day, the accused was not so intoxicated that he did not know what he did or that he did not know what he did was wrong (see paras 60–62).

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(2) Although the accused had testified that he had been drinking *langkau* and Royal liquor since morning, he did not say that he was forced to drink. Self-induced intoxication was not a defence under s 85(a) of the Code (see para 63).

(3) The evidence showed that the accused used the knife to stab the deceased twice, one stab which cut the left forearm and the other which pierced the left side of the chest. The evidence contradicted his assertion that he only stabbed the deceased once ie to the left chest of the deceased. It was inflicted with sufficient force. It was a fatal stab wound which was sufficient in the ordinary course of nature to cause death to the deceased, which in this case was imminent (see para 68).

(4) Failure of the defence to cross-examine the prosecution's witnesses on the matter went to the credibility of the testimony ie the credibility of the accused in this case. It had also been held that failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of the witness's testimony (see para 70).

(5) The accused failed to give an acceptable explanation to the court as to his guilt and failed to raise a reasonable doubt as to his guilt. At the end of the trial, on the totality of the evidence, the prosecution had proved its case beyond reasonable doubt against the accused on the charge under s 302 of the Code (see paras 71–72).

[Bahasa Malaysia summary

Pada 2 Julai 2016, pada lebih kurang jam 8.30 petang, seorang pegawai polis ('SP1') dari IPD Kota Samarahan telah menerima laporan berlakunya satu kes pergaduhan daripada Unit Gerakan Sarawak di Kampung Kuap, Jalan Kimura di mana seorang lelaki dilaporkan mengalami kecederaan. SP1 kemudian melaporkan kejadian ini kepada seorang pegawai polis yang lain ('SP12'), seorang anggota polis peronda bersama anggota peronda yang lain untuk pergi ke tempat kejadian, ketika sampai di tempat kejadian iaitu pada pukul 9.05 petang, mereka melihat orang ramai berkumpul di hadapan sebuah rumah. Kemudian, mereka melihat mayat dalam keadaan ditutupi pakaian putih di hadapan rumah tersebut. Mayat tersebut telah dikenal pasti di tempat kejadian sebagai Jeffery ak Ah Kiang ('si mati') oleh ayahnya ('SP4'). Seorang orang awam kemudian telah menyerahkan suspek kepada SP12 yang kemudiannya telah menahan suspek. Suspek merupakan tertuduh dikenal pasti sebagai William Josep ak Ah Kiang oleh SP4 di tempat kejadian. Tertuduh merupakan adik kepada si mati. Ayah tertuduh juga mengecam dan mengenal pasti tertuduh di mahkamah. SP1 kemudian telah membuat laporan polis di atas maklumat yang diperolehi dan SP12 kemudiannya telah membuat laporan tentang penahanan suspek. Tertuduh didakwa atas tuduhan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') kerana menyebabkan kematian pada si mati.

Diputuskan, mensabitkan tertuduh:

(1) Tertuduh telah berjaya mengekalkan waras fikiran ketika kejadian. Walaupun tertuduh telah minum alkohol pada hari kejadian, tertuduh

tidak berada dalam keadaan yang memabukkan yang membolehkan tertuduh tidak mengetahui apa yang dilakukan atau tidak mengetahui apa yang dilakukan adalah salah (lihat perenggan 60–62).

(2) Walaupun tertuduh mengakui dia telah meminum minuman keras sejak dari pagi pada hari kejadian, tertuduh tidak mengatakan dia dipaksa untuk mengambil minuman keras tersebut. Memabukkan disebabkan pengambilan secara persendirian bukannya satu bentuk pembelaan di bawah s 85(a) Kanun (lihat perenggan 63).

(3) Bukti-bukti menunjukkan tertuduh telah menggunakan pisau untuk menikam si mati sebanyak dua kali, satu tikaman pada bahu sebelah kiri si mati dan satu lagi tikaman di sebelah kiri dada si mati. Bukti-bukti ini telah bercanggah dengan kenyataan tertuduh yang mengatakan dia hanya menikam si mati hanya sekali sahaja iaitu pada sebelah kiri dada si mati. Tikaman tersebut merupakan satu tikaman maut yang sudah mencukupi pada keadaan normal untuk menyebabkan kematian kepada si mati (lihat perenggan 68).

(4) Kegagalan pihak pembelaan untuk menyoal balas saksi pendakwaan menimbulkan kredibiliti tertuduh. Adalah diputuskan bahawa kegagalan untuk menyoal balas saksi pada isu-isu penting menjurus kepada penerimaan testimoni dan keterangan saksi-saksi tersebut (lihat perenggan 70).

(5) Kegagalan pihak pembelaan untuk menyoal balas saksi pendakwaan menimbulkan kredibiliti tertuduh. Adalah diputuskan bahawa kegagalan untuk menyoal balas saksi pada isu-isu penting menjurus kepada penerimaan testimoni dan keterangan saksi-saksi tersebut (lihat perenggan 70).]

Notes

For cases on murder, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1911–1919.

Cases referred to

Aboys ak Saon (M) v PP [2014] 1 MLJ 710, CA (refd)
Asri bin Beddu v PP [2013] 3 MLJ 893; [2013] 2 AMR 565, CA (refd)
Balasundram a/l Paskaran v PP [2012] 4 MLJ 347, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2012] 8 CLJ 537, FC (refd)
Chung Tain Kong @ Chung Fook Chung v PP [2009] 5 MLJ 1, CA (refd)
Director of Public Prosecutions v Majewski [1977] AC 443, HL (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Kumaran a/l Sappani v PP [2012] 6 MLJ 153; [2011] 2 AMR 486, FC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Murugan a/l Arumugam v PP [2014] MLJU 1886; [2017] 3 CLJ 377, FC (refd)

A *PP v Megat Shahrizat bin Megat Shahrur* [2013] 3 MLJ 227; [2011] 8 CLJ 893, FC (refd)
PP v Mohd Nor Riza bin Mat Tahar [2011] 2 MLJ 21, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174; [1976] 1 LNS 159, FC (refd)
Virsa Singh v The State of Punjab AIR 1958 SC 465, SC (refd)
B *Wawan bin Sanrego v PP* [2013] 1 MLJ 658, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

C Evidence Act 1950 s 32(1)
Penal Code ss 85, 85(a), 86, 86(2), 299, 300, 302
Road Transport Act 1987

Mohd Fillanny bin Siji (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
D *Ateng Jeros (Ateng Jeros & Co Advocates) for the defendant.*

Stephen Chung J:

E **[1]** The accused was charged for murder under s 302 of the Penal Code. The charge reads as follows:

> That you, on the 2nd July 2016, at about 7.30 pm, at an address of No 163, Kampung Kuap, Batu 10, Jalan Penrissen, in the District of Kota Samarahan, in the State of Sarawak, did commit murder by causing the death of one Jeffery anak Ah
F Kiang (M) (NRIC: 841011-13-5629) and that you have thereby committed an offence punishable under section 302 of the Penal Code.

[2] Culpable homicide and murder are defined in ss 299 and 300 of the Penal Code respectively. In order to establish a prima facie case against the
G accused under s 302 of the Penal Code, the prosecution has to prove: (a) the death of the deceased; (b) that the deceased died as a result of injuries sustained by him; (c) that the injuries which resulted in the deceased's death were caused by the acts of the accused; and (d) in inflicting the injuries upon the deceased, the accused caused them with the intention of causing death, or caused them
H with the intention of causing such bodily injuries as he knew to be likely to cause the death of the deceased, or cause them with the intention of causing bodily injuries and such injuries were sufficient in the ordinary course of nature to cause death, or caused them with the knowledge that the acts were so imminently dangerous that they must in all probabilities cause death and
I committed such acts without any excuse for incurring the risks of causing death or such injuries.

[3] The prosecution submitted that it had adduced credible evidence in proving each ingredient of the offence which if unrebutted or unexplained

would warrant a conviction. The prosecution submitted that the identity of the deceased and of the accused was never challenged because the family members PW4, PW5, PW6 and PW10 had identified them.

[4] The prosecution submitted that the accused had stabbed the deceased causing the injuries resulting in the death of the deceased. The prosecution submitted that at the material time only the deceased and the accused were in the house watching TV and that the accused was the only one who had the opportunity to commit the crime. It was submitted that although the accused stabbed his elder brother during the quarrel, it was done with the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death to the deceased.

[5] Counsel for the accused, in his submission, conceded that there was indisputable evidence that the deceased was Jeffrey ak Ah Kiang and that the deceased died of injuries that were inflicted on him. He referred to the evidence of PW7 (the pathologist) who performed the autopsy that the deceased died of the stab wound on the chest.

[6] He submitted that the next question was whether the death of the deceased was caused by the accused. He referred to the testimonies of PW4, PW10 and PW11 and submitted that their testimonies were full of contradictions and inconsistencies. It was submitted that as a matter of prudence and practice that their testimonies should be rejected unless corroborated.

[7] It was submitted that the two stab wounds could possibly be due to the deceased falling onto a sharp object. It was submitted that the prosecution had failed to prove a prima facie case against the accused.

[8] This was an unfortunate and tragic incident within the family. The facts of the case were as follows. On 2 July 2016, at about 8.30pm, PW1, from IPD Kota Samarahan, received information from the Unit Gerakan Sarawak about a fighting case at Kampung Kuap, Jalan Kimura and that one man was injured. PW1 conveyed this information to PW12, who was in a police mobile patrol vehicle (MPV), with other police personnel, to go to the address. On arrival, at about 9.05pm, they saw a crowd in front of one house. Then they saw a dead body covered with a white cloth in front of the house. The deceased was identified as Jeffery ak Ah Kiang by his father (PW4) at the scene. A member of the public handed one male suspect to PW12 who arrested the suspect. The suspect, who is the accused in this case, was identified as William Josep ak Ah Kiang by his father (PW4), also at the scene. The accused was the younger brother of the deceased. His father also identified the accused in court. PW1 lodged a police report (exh P2) on the information received and PW12 lodged

a police report (exh P16) on the arrest.

[9] PW15, from the police forensic unit, was also instructed to go to the crime scene. He took a swab of dried blood, near the body of the deceased, in front of the door of the house. He said he was guided by the accused to recover a knife, measuring eleven and half inches, in the bush, at the roadside, about 300m from the house. The knife was tendered in court as exh P41B. He instructed one of his men to make a sketch plan of the scene (see exhs P22 and P23). After completing investigation at the scene, he brought the items back to IPD Kota Samarahan and handed them to PW16, the investigation officer. PW15 prepared a report of his investigation at the scene. His report was tendered as exh P20. He also prepared a handing over note between him and PW16 and this handing over note was tendered as exh P21.

[10] At IPD Kota Samarahan, PW13 was instructed to seize the clothes worn by the accused on that night ie a pair of blue jeans, one green t-shirt and a belt with a lion-head buckle. He prepared a search list which was tendered as exh P17. He prepared a handing over note and handed the clothes which he seized to PW16. The handing over note was tendered as exh P18.

[11] PW8, a medical officer, was requested by the police to take some specimen from the accused. On 3 July 2016, PW8 took blood specimens and finger-nail clippings from the accused for DNA, alcohol and drug analysis. The specimens taken were handed to PW16 (see handing over note exh P15).

[12] PW7 was a senior consultant forensic pathologist with Hospital Kuala Lumpur (see his CV tendered as exh P12). He was requested to perform a post-mortem on the deceased which he did on 4 July 2016 at 9am at the mortuary of the Sarawak General Hospital. The deceased was identified by PW16 and by PW6 who is the mother of the deceased and of the accused. PW7 prepared his post-mortem report which was tendered as exh P13.

[13] During the post-mortem, PW7 collected four specimens from the deceased: (a) blood for toxicology analysis; (b) blood for DNA analysis; (c) hair samples for analysis; and (d) nail clippings of the right hand. All these specimens and the clothes worn by the deceased were handed PW16 after the post-mortem examination.

[14] PW16 instructed a police photographer (PW2) to take photographs of the crime scene, which were tendered as exh P5 (1–16), and to take photographs at the post-mortem of the deceased, which were tendered as P6 (1–19).

[15] PW16 packed the items seized and the specimens taken from the

deceased and the accused to be sent to the Chemistry Department, Kuching for analysis. He instructed a police photographer (PW3) to take photographs of the items seized by the police and the specimens taken which he had packed and to be sent to the Chemistry Department. These photographs were tendered as exh P9 (1–34). PW16 then sent these items and specimens to the Chemistry Department, Kuching together with a request form for analysis (see exh P23).

[16] After the analysis, PW14 was requested by PW16 to pick up the items and specimens, which were kept in two plastic bags, and two chemist reports, which were in two separate white envelopes, from the Chemistry Department, Kuching and handed them over to PW16. These were produced and tendered as exhibits in court. The chemist report on the analysis of the blood specimens taken from the deceased and accused was tendered as exh P47. The chemist report on the DNA analysis on the items seized and specimens taken was tendered as exh P48.

[17] On the cause of death, PW7 testified that on external examination of the body of the deceased, the deceased was wearing a pair of blue shorts stained with blood, a brown belt and brown underpants also stained with blood and there were bloodstains on the chest. There were two stab wounds, one stab wound on the left side of the chest measuring 5.5cm with the depth of 8cm and a small stab wound measuring 2.5cm with the depth of 3.5cm on the left forearm. He said there were no other obvious external injuries seen on the deceased. On examination of the head, neck and mouth, they did not show any obvious evidence of injury or disease.

[18] On examination of the chest, the stab wound penetrated through the first left intercostal space, then went through the left lung and finally cutting through the heart. The left cavity of the chest contained 1.5 litres of fluid blood and blood clot. He said the right lung was normal. On further examination, the heart did not show any evidence of disease and an examination of the abdomen did not show any evidence of injury or disease to all the internal abdominal organs.

[19] PW7 testified that from the post-mortem, the deceased sustained two stab wounds on the body. He said the fatal stab wound was the one sustained on the left chest which finally penetrated the heart causing excessive blood loss and the stab wound on the left forearm was consistent with a defence wound. He said based on the pattern of injury, he was of the opinion that the object which caused the stab wound to the chest was a sharp and pointed object such as a knife. He said the cause of death was the stab wound to the chest which was sufficient in the ordinary course of nature to cause death to the deceased. PW7's testimony that these two wounds were stab wounds contradicted the

A submission of counsel for the accused that the wounds could probably be due to the deceased falling onto a sharp object.

[20] Based on the chemist report (exh P48), the DNA profiles developed from bloodstains indicated on long pants 'E1', waist-belt 'E9', underwear B 'E10', swab 'E16', and blade of knife 'E17' (exh 41B) identified a common male contributory source with a DNA profile matching the DNA profile of bloodstained specimen 'E11' (labelled 'Jeffery anak Ah Kiang') (deceased) thus indicating the DNA identified originated from the same source.

C **[21]** A mixed DNA profile (from at least two contributory sources) was developed from the bloodstains indicated on waist-belt 'E3'. The source of bloodstained specimen 'E11' (labelled 'Jeffery anak Ah Kiang') was distinguished to be the major contributory source of the DNA. The probability of a randomly selected unrelated individual having a DNA profile matching D the DNA profile of bloodstained specimen 'E11' (labelled 'Jeffery anak Ah Kiang') and being the major contributory source of the DNA at fifteen STR loci is as stated in para (i). The donor of bloodstained specimen 'E4' (labelled 'William Josep anak Ah Kiang') is indicated from being a minor contributory source of the DNA. E

[22] It was not in dispute that the deceased had died from the stab wound inflicted to his left chest. Based on the testimony of PW7, this was a fatal stab wound which was sufficient in the ordinary course of nature to cause death to F the deceased.

[23] Although the DNA of the accused was not detected on the knife, did the accused use the knife to inflict the stab wound to the chest which caused the deceased's death? PW4 and PW6 are the parents of the deceased and the G accused. The deceased was the elder brother of the accused. At the time of the incident PW4 was at home while PW6 was at work. PW4 previously had a stroke, had speech impediment and had to use a wheelchair for mobility.

[24] PW4 testified that at that time he was outside the house and the H deceased and the accused were watching television (TV) in the house. Based on the sketch plan (exh P22), the TV was in the living room of the house. PW4 said both of them started arguing about which programme to watch. He said the deceased got angry and both were quarrelling. He did not know what happened but apparently they went to the kitchen because PW4 said the two of I them were then in the kitchen.

[25] Then both of them came out of the house because PW4 said he saw the deceased fell down outside the house, where his body was found by the police. He said he did not know why the deceased fell down but he heard the deceased

said 'Pak, aku mati'. The deceased said this to his father when he fell down and died in front of the house. PW4 saw blood on the chest and stomach of the deceased. The provision in relation to a dying declaration is provided under s 32(1) of the Evidence Act. This statement was admissible: *Murugan a/l Arumugam v Public Prosecutor* [2014] MLJU 1886; [2017] 3 CLJ 377. It should be noted that the deceased did not say who did it.

[26] PW4 said the accused told him that the deceased punched him but he did not see and he did not know whether the accused also punched the deceased. He said he shouted for help. He said the accused then left the house and relatives and neighbours came to the house.

[27] PW5 was a sister-in-law of PW4. At that time she and her family were at home when she and her husband heard PW4 shouting for help. She then shouted to the neighbours for help and asked them to go to the house of PW4. They went to PW4's house. At the house she saw the body of the deceased covered with blood, lying on the floor, outside the house. PW5 was asked and she said she knew both the deceased and the accused since they were young. She was referred to photographs in exh P5 and she identified the deceased and the house shown in the photographs. She also identified the accused in court. She lodged a police report which was tendered as exh P10.

[28] PW10 was also a sister-in-law of PW4 and the aunt of the deceased and the accused. She said PW4 and his family lived near to their house. She said at that time she and her family were having dinner when suddenly the accused came to their house with a knife and the accused said that he had killed Dom. PW10 was shown a photograph of the deceased and she identified Dom as the deceased. PW10 explained that the deceased was also known as Dom. PW10 also identified the accused in court.

[29] She said she took the knife from the accused and threw it at the roadside and the accused then went back to his house. Later the police came looking for the knife and she said she pointed it to the police. PW10 was shown photographs 13–14 of exh P5 and identified the knife shown in the photographs to be the knife which she took from the accused and threw it at the roadside. She said the accused looked scared when he said that Dom had died but they did not believe him then. After that she heard from PW5 that Dom had passed away and she was shocked.

[30] PW6 was at work when she received the news about what happened at the house. At the house, when she saw the body of the deceased with a wound on his chest covered with blood, she was speechless and worried and held the body of the deceased until the neighbours advised her not to hold him anymore as the police would arrive soon.

A **[31]** At the house she saw the accused sitting alone in the living room and he was crying. She saw bloodstains on his trousers. She approached the accused but he did not say anything. She said she wanted to know and she asked the accused whether he intentionally did that and the accused answered it was unintentionally.

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[32] On evidence adduced, it was not in dispute that the accused had used the knife to stab the left chest of the deceased which caused the death of the deceased. It was not in dispute that the deceased died of a single stab wound to the chest. The question was whether the acts of the accused in inflicting the C injuries on the deceased was with the intention of causing death.

[33] The difference between ss 299 and 300 of the Penal Code is in the degree of probability or likelihood of causing death. If death is an imminent result, it falls under s 300 but if death is a likely result, it falls under s 299 of the D Penal Code. The applicability of s 299 only comes into question once s 300 has been ruled out: see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; [1976] 1 LNS 159; *Public Prosecutor v Megat Shahrizat bin Megat Shahrur* [2013] 3 MLJ 227; [2011] 8 CLJ 893; *Cheong Kam Kuen v Public* E *Prosecutor* [2013] 1 MLJ 15; [2012] 8 CLJ 537.

[34] In considering whether the intention to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there is an intention to strike at a vital or dangerous spot, and whether F with sufficient force to cause the kind of injury found to have been inflicted: *Virsa Singh v The State of Punjab* AIR 1958 SC 465; *Wawan bin Sanrego v Public Prosecutor* [2013] 1 MLJ 658.

[35] Based on the testimony of their father (PW4), the deceased and the G accused were watching TV and started arguing about which programme to watch and ended up quarrelling in the kitchen. After the deceased fell down and died, the accused told his father that the deceased had punched him. PW4 said he did not see. The accused also told his mother that the stab wound inflicted was unintentional. He regretted what happened and he was crying. H They were brothers. They were watching TV and argued about something very minor. There was no evidence that the accused had a grudge against the deceased or that he was taking revenge.

[36] Counsel for the accused did not put to the prosecution's witnesses that I it was in self-defence or that there was a sudden fight or sudden and grave provocation. It was not put that the deceased in punching the accused that there was an impending peril to his life or great bodily harm to him, either real or apparent. He did not say that he was cornered and could not retreat or escape or why there must have been a necessity of taking life: *Chung Tain Kong @*

Chung Fook Chung v Public Prosecutor [2009] 5 MLJ 1; *Aboys ak Saon (M) v Public Prosecutor* [2014] 1 MLJ 710.

[37] Based on the chemist report (exh P47), both the deceased and accused had consumed alcohol at the material time. The blood specimens showed that the deceased had 204g per 100ml of ethyl alcohol and the accused had 201mg per 100ml. At the end of the prosecution's case, both the prosecution and defence never submitted that due to the alcohol found in the blood that these alcohol/blood readings had crossed the threshold or that the deceased and or the accused were intoxicated as a result.

[38] Counsel for the accused did not put to the witnesses that the accused was by reason of intoxication that he was rendered temporarily insane at the time he stabbed the deceased, such that he could not have formed the intention to cause that fatal stab wound. There was no evidence that the accused was intoxicated at that time: see *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671.

[39] There was also no evidence where the knife was kept or placed at that time, whether inside a drawer or cabinet or on a table in the kitchen. The prosecution did not lead any evidence whether the knife was in full view of the accused or whether he opened a drawer or cabinet to take the knife in order to stab the deceased.

[40] Based on the testimonies of the witnesses, and the circumstantial evidence, the accused took the knife to stab the deceased. In all probabilities, the first stab was to the left arm of the deceased. PW7 described this as a defensive wound. The second stab was to the left chest which caused the death of the deceased. PW4 said that the knife was a kitchen knife. It measured eleven and a half inches. Looking at the length of the knife, if it is used to stab a person, in particular at the chest, it will likely pierce the chest and an internal organ. Any person, who uses such a knife, with sufficient force, to stab the chest of another person, knows that it will penetrate the chest and pierce an internal organ which will cause serious injuries.

[41] In this case, it was not a cut or slice wound. It was a stab would inflicted with force. The stab wound penetrated through the first left intercostal space, then went through the left lung and finally cut through the heart. This was confirmed by PW7. This stab wound was a fatal stab wound which was sufficient in the ordinary course of nature to cause the death of the deceased. The evidence showed that after he was stabbed in the chest with the knife by the accused, the deceased fell down, said to his father 'Pak, aku mati' and died. The deceased's death was imminent or immediate and came within s 300 of the Penal Code.

A **[42]** At the end of the prosecution's case, on a maximum evaluation of the evidence, the prosecution has made out a prima facie case against the accused under s 302 of the Penal Code. The accused was called to enter his defence.

B **[43]** In defence, the accused testified under oath and has prepared his witness statement. This was tendered as exh D3. The accused testified that he is the fourth child in the family of five children. His elder brother, the deceased, was number two in the family. He said at the time of the incident, on 2 July 2016, he was 25 years old and the deceased was 30 years old.

C **[44]** He said on 2 July 2016 at about 8am, he and the deceased went to work at a site near the JPJ, 11th Mile Kuching/Serian Road doing some pipe repair works. While working, they started drinking 'langkau' mixed with 'Royal' liquor (black liquor). He said their uncle Thomas ak Agin (DW3) was also working and drinking with them. He said they did not have anything to eat and left the work site at about 1pm They reached home at about 1.30pm.

[45] He said while watching TV in the living room, they continued to drink *langkau*. He said he did not eat anything and did not know whether the deceased ate anything. He said he was watching a Malay programme whereas the deceased wanted to watch a cartoon programme who kept changing channels using the TV remote control. He said their father and their six year old niece were also watching TV with them. Because the deceased and he wanted to watch different programmes, they were grabbing for the remote control from each other's hand which caused the remote control to drop from the deceased's hand onto the cement floor and it broke. He said the deceased picked up the broken remote control and threw it at him.

[46] The accused said he asked the deceased why he threw the remote control at him but the deceased straightaway punched him. He said they punched and pushed each other out of the living room into the motorcycles parking area. He said the deceased then grabbed hold of a knife. He did not know from where the deceased took the knife. He said the deceased threw the knife at him which cut his left ear. He said they grabbed hold of each other and fell onto the floor and continued to fight while on the floor, grabbing each other, pulling and punching each other, each trying to get hold of the knife which was on the floor.

[47] He said he managed to get hold of the knife and in the middle of the struggle he unintentionally stabbed the deceased on the left chest with the knife once. After that they stopped fighting. He said the deceased was able to rise up and stand.

[48] He said he left the house and went to his aunty Alin's house to seek help

from her which was quite a distance from their house. He said he was still holding the knife when he reached her house where he asked for help. He said he told her that he quarreled with his brother and asked her to see his brother (the deceased). He said he also told her that while he was quarrelling with the deceased, and during the struggle with him, he accidentally stabbed the deceased with the knife that had earlier been thrown at him. He said he told her that he did not know whether the deceased was dead or still alive. He said he then threw the knife near the aunt's house and then followed his aunty back to his house. Upon reaching home he saw his brother lying on the cement floor, motionless.

[49] The accused said their father was still in the living room and did not see the fighting in the motorcycles parking area. He said at the time they were both drunk because they had been drinking *langkau* and Royal liquor since morning, while working, and they continued drinking *langkau* in the house after they got home. He said his brother was a hot tempered person and easily got angry when he was drunk. The accused said he never had the intention to kill his brother.

[50] The accused has raised intoxication as a defence. He testified that he was drunk at that time. He said while working on that morning, the three of them, namely DW3, the deceased and himself, had drunk *langkau* and Royal liquor. He said while watching TV at home, he and the deceased continued drinking langkau. Counsel for the accused submitted that voluntary or self-induced intoxication negates mens rea which is a defense and therefore s 86(2) will have no application, citing *Director of Public Prosecutions v Majewski* [1977] AC 443.

[51] It should be noted that what the accused had said about what happened on that day including drinking *langkau* and Royal liquor were not raised during the prosecution's case. However the accused has called his uncle (DW3) to testify. DW3 has prepared a witness statement. This was tendered as exh D2. DW3 testified that the deceased brought a bottle of Royal liquor and the three of them drank Royal liquor while working during that morning. He said he drank two to three cups and the other two finished the bottle. He did not say how much they consumed or how much the accused consumed while working. After they finished work, they went home. DW3 was not present in the house of the deceased and accused and could not testify what happened in the house and whether they continued drinking *langkau* in the house.

[52] Based on the evidence, both the deceased and the accused had consumed alcohol. That might affect their judgment and actions. The question is whether the accused was intoxicated at the material times. The defence of intoxication is provided in ss 85 and 86 of the Penal Code. Under s 86,

intoxication is not a defence to a criminal charge. The burden was on the accused to establish on a balance of probabilities that the defence of intoxication came within the exception: *Asri bin Beddu v Public Prosecutor* [2013] 3 MLJ 893; [2013] 2 AMR 565. Where intoxication is an issue, the court has to determine whether the accused had the requisite intent in the light of intoxication: see *Balasundram a/l Paskaran v Public Prosecutor* [2012] 4 MLJ 347.

[53] Based on the chemist report (exh P47) prepared by DW2, it was not in dispute that both the deceased and the accused had consumed alcohol. As stated above, the report showed that the deceased had 204mg per 100ml of ethyl alcohol and the accused had 201mg per 100ml of ethyl alcohol. DW2 was asked by counsel what was the effect of this level of alcohol on a human body and he replied that the effect of alcohol may differ according to the individual (but) based on his readings it usually causes drowsiness and loss of coordination.

[54] He was asked and he said he could not determine any individual drunkenness based on alcohol readings because this is due to variation of alcohol metabolism between individuals. He said for a sober person the reading is usually less than ten. He was asked by court and he said that based on the Road Transport Act 1987, any person with 80g per 100ml of alcohol was not allowed to drive a motor vehicle. Did that make the deceased and or the accused drunk or intoxicated? Specifically, was the accused intoxicated at that time?

[55] It has been held that the blood alcohol level itself can never be conclusive to determine the degree of intoxication of an accused for different people react differently to the same blood alcohol level: see *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481; *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; [2011] 2 AMR 486. Counsel for the accused did not put to DW2 that based on the blood alcohol level of the accused that he was intoxicated. It was not put to DW2 that based on the blood alcohol level, the accused was by reason of intoxication rendered temporarily insane at the time he stabbed the deceased.

[56] Apart from DW2, the defence did not call any other expert nor tender any medical or scientific report to establish that the accused was at that time so intoxicated that he could not have formed the intent to cause the fatal stab wound to the deceased.

[57] Although the accused has said that at the time they were quarreling and both of them were drunk, this was not put to the prosecution's witnesses, in particular to PW4. It was not put to PW4 whom the accused alleged that PW4

was watching TV together with them in the living room that the deceased and the accused were at that time drinking *langkau* and Royal liquor. It was not put during the prosecution's case that the accused had been drinking and was intoxicated at that time. It was not put that the accused by reason of the intoxication that he was rendered temporarily insane or that he had no knowledge of what he was doing at that time.

[58] It was not put to the witnesses, and the accused did not testify how much *langkau* and or Royal liquor they had drunk at work that morning. In particular he did not testify how much he had drunk that morning while at work. Although DW3 testified that they had drunk *langkau* and Royal liquor, DW3 did not testify how much the accused had drunk that morning. The accused also did not testify how much alcohol he had drunk while watching TV in the house. The defence did not adduce any evidence how much alcohol the accused had drunk on that day.

[59] The evidence showed that after the accused had stabbed the deceased, he left the house and walked to the house of PW10 holding the knife where he told PW10 that he had stabbed the deceased but did not know whether the deceased was dead or still alive. He asked her to check on the deceased. PW10 said the accused was crying because he had stabbed the deceased and she took the knife from him and threw it away. She said the accused then walked back to his house with them.

[60] These illustrated that the accused knew that he had stabbed the deceased. He was afraid that he had killed the deceased and was crying. It showed he regretted his action in stabbing the deceased. He went to the house of PW10 to seek help. He was able to walk to that house and walked back. He was able to speak and told PW10 what happened. Back in the house he was crying in the living room. In giving his testimony he could recollect what happened. He knew what he did. These showed that he had and maintained his mental faculty. These were not the actions or conduct of an intoxicated person. Although he had consumed alcohol during the day, the accused was not so intoxicated that he did not know what he did or that he did not know what he did was wrong.

[61] It was not put to PW10 that the accused at that time was intoxicated or in an intoxicated state. It was not put to her that the accused could not walk in a straight line or that he staggered or was swaying from side to side due to intoxication. It was not put that he could not talk properly or had slurred in his speech. It was not put that he did not understand the conversation. It was not put that the accused did not know what he did. It was not put that the accused did not know what he did was wrong.

[62] The accused did not testify, in particular in his prepared witness statement, that by reason of intoxication that he was rendered temporarily insane at the time he stabbed the deceased. He did not testify that as a result of the intoxication that he did not know what he did was wrong. He did not say that as a result of the alcohol consumed that he was so intoxicated that he could not have formed the intent to cause the bodily injuries or to inflict the fatal stab wound to the deceased.

[63] Although the accused has testified that he had been drinking *langkau* and Royal liquor since morning, he did not say that he was forced to drink. Self-induced intoxication is not a defence under s 85(a) of the Penal Code: *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2011] 2 MLJ 21.

[64] The accused has failed, on the balance of probabilities, to establish the defence of intoxication. He failed to establish that he did not know what he did was wrong or that he did not have the intent to inflict the fatal wound to the deceased due to intoxication.

[65] Next, the accused has testified that the deceased threw the knife at him and the blade of the knife cut his left ear. Therefore the accused called DW1 as a witness, who was the doctor called by the police to attend to the accused because of a cut to his left ear. DW1 prepared a report on his examination of the accused. This report was tendered as exh D1. It did not state how the accused had a cut to his left ear. DW1 was asked and he said he did not know how the accused had suffered a cut to the left ear. Obviously he did not ask the accused and the accused did not tell DW1 how he had this cut to his left ear. Clearly the accused did not tell DW1 that the deceased had thrown a knife at the accused which cut his left ear. If he did, DW1 would have put this in his report. Counsel for the accused did not suggest that maybe DW1 forgot or left it out. The accused did not lodge any police report that the deceased had thrown the knife at him which cut his left ear. What the accused had said that the deceased had thrown the knife at him cutting his left ear was never put to any of the prosecution's witnesses. It was clearly an afterthought.

[66] As stated above, the accused has testified that after they reached home, he and the deceased continued to drink *langkau* while watching TV in the living room. He then described about the struggle between them for the remote control which dropped from the hand of the deceased, that it broke and that the deceased threw it at him. He said the deceased then punched him, that they fought each other from the living room to the motorcycle parking space outside the house and that the deceased took a knife, that they struggled for the knife and during the struggle he unintentionally stabbed the deceased in the chest and after that he left the house to seek for help from his aunty. It should be noted that all these were said for the first time during the case for the defence.

These allegations were not raised during the prosecution's case and never put to any the prosecution's witnesses, including to his father (PW4). DW3 was not present in the house and could not corroborate the accused on these allegations.

[67] Although he said his father was watching TV with them in the living room, it was not put to PW4 that PW4 was watching TV in the living room together with them. It was not put to PW4 that the accused and the deceased had drunk *langkau* while watching TV. Although he said his father was present in the living room, it was not put to PW4 that the deceased threw the remote control at the accused and then straightaway punched the accused. The accused then said they punched and pushed each other out of the living room into the motorcycle parking area. He said the deceased took a knife and they struggled for the knife. All these were not put to PW4. PW4 has testified that at that time he was outside the house and the deceased and the accused were watching TV in the house. He said the deceased got angry and both were quarreling. He said he did not know what happened but subsequently both of them were in the kitchen. The evidence showed that the accused used a knife to stab the deceased and PW4 said it was a kitchen knife. What PW4 has testified about what happened on that day, which was not challenged in cross-examination, has contradicted the allegations of the accused.

[68] The accused also said they struggled for the knife and he unintentionally stabbed the deceased with the knife in the chest. The evidence showed that the accused used the knife to stab the deceased twice, one stab which cut the left forearm and the other which pierced the left side of the chest. The evidence contradicted his assertion that he only stabbed the deceased once ie to the left chest of the deceased. It was inflicted with sufficient force. It was a fatal stab wound which was sufficient in the ordinary course of nature to cause death to the deceased, which in this case was imminent.

[69] Although it was submitted as such, there was no evidence to support the allegations of the accused that there was a sudden fight and it was in self-defence.

[70] All these raised serious doubts on his testimony. It has been held that failure of the defence to cross-examine the prosecution's witnesses on the matter goes to the credibility of the testimony ie the credibility of the accused in this case. It has also been held that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony, in this case the testimony of PW4, PW10 and PW7: see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.

[71] The accused has failed to give an acceptable explanation to the court as

to his guilt. He has also failed to raise a reasonable doubt as to his guilt: see *Mat v Public Prosecutor* [1963] 1 MLJ 263.

[72] At the end of the trial, on the totality of the evidence adduced, the prosecution has proved its case beyond reasonable doubt against the accused on the charge under s 302 of the Penal Code. I find the accused guilty and record a conviction against him.

The accused was convicted.

Reported by Mohd Kamarul Anwar